



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss R Latif

Respondents
Eminant Childcare Limited t/a
Laugh 'n' Learn

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 27 October 2017

EMPLOYMENT JUDGE Anstis (sitting alone)

Representation:

Claimant: Mrs S Latif (lay representative)

Respondent: Miss E Rowley (consultant)

RESERVED JUDGMENT

1. The Claimant's complaint of unlawful deductions from wages is well-founded.
2. The Respondent must pay £1,171.58 to the Claimant.

REASONS

INTRODUCTION

1. The Claimant was employed by the Respondent from 4 January 2016 until 17 February 2017 as a nursery practitioner. Her contract of employment described her as an apprentice nursery practitioner, but by the time of this hearing the Respondent was no longer contending that the Claimant was an apprentice.
2. Following this the Claimant brought a claim to the employment tribunal. Many different points are raised in that claim, but all the claims that I have jurisdiction to deal with all relate in some way to underpayment of wages or holiday pay, and are primarily an allegation that the Respondent had not paid her the national minimum wage.
3. By the time of this hearing, the Respondent admitted that it had not paid the Claimant the national minimum wage. Earlier this month it had paid the Claimant what it said she was due by way of underpayment of the national minimum wage. The Claimant did not accept that this was all that was due. Having established her entitlement to the national minimum wage, the question for me in this hearing was whether, in the light of that additional payment, there remained any liability from the Respondent to the Claimant.

4. Both in her application to the tribunal and in Mrs Latif's later submissions on her behalf, the Claimant emphasised the difficulties that these matters and the dispute which lead to the end of her employment had caused to her health. I note those submissions, and in an appropriate case that is the kind of thing that could lead to an award of damages for injury to feelings. However, I do not consider that any of the jurisdictions engaged in this claim would permit me to make an award of injury to feelings, so I will say no more about that.
5. Conscious of my duties under rule 3 of the Employment Tribunals' Rules of Procedure I sought at the outset of this hearing and at various points along the way to encourage the parties to resolve this dispute by agreement. Despite a number of discussions between the parties during the course of the day they were unable to do so. I understood from Mrs Latif that the Claimant had only received the Respondent's bundle and various important papers such as the timesheets and payslips the evening before the hearing. That should not have happened, but if that was the case that it would be one reason why the parties were not able to agree on any point or even narrow down the issues for consideration at this hearing.

THE LEGAL FRAMEWORK

6. Technically an allegation of underpayment of the national minimum wage can be brought either as a claim of unlawful deductions from wages or as a claim of breach of contract. Except for one point, Miss Rowley did not suggest that any of the Claimant's claims were out of time or that there was any technical objection to these matters being claimed as either an unlawful deduction from wages or breach of contract. I have dealt with it as a claim of unlawful deductions from wages.
7. At the outset of the hearing I reminded the parties that under section 28 of the National Minimum Wage Act 1998 the burden of proof was on the Respondent to show that the Claimant was paid at least the national minimum wage. This obligation is reinforced by regulation 59 of the National Minimum Wage Regulations 2015 which provides:

“(1) The employer of a worker who qualifies for the national minimum wage must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage.

“(2) The records required to be kept under paragraph (1) are to be in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document.”

8. It is not in dispute that the rates of national minimum wage to which the Claimant is entitled are £6.70/hour up to 1 April 2016 and £7.20/hour from 1 April 2016 onwards.

THE FACTS AND MY CONCLUSIONS

9. Given that the burden of proof was on the Respondent, I heard first from the Respondent's witnesses, who were Habib Rehman, an external accountant who administered the Respondent's payroll, and Terri Warner, who was the nursery manager (and had previously been the deputy manager). I then heard the Claimant's evidence. The Claimant did not submit a formal witness statement, but adopted pages 10-15 of the bundle (the narrative of her ET1) and a document headed "notes for employment tribunal" at p101-105 as her witness evidence. I was also provided with a bundle comprising 159 pages from the Respondent.
10. The Claimant raised many different issues relating to underpayment of wages, and I will set out below my findings under the different headings of underpayment alleged.

“Standard” working hours

11. There are three types of documents in the tribunal bundle which deal with working hours. There are staff rotas, showing the intended working pattern, there are extracts from a signing in book, presumably showing when staff were on the premises, and there are also time sheets. It is the time sheets that were used by the Respondent to work out the pay due to any individual worker.
12. There is a complete set of timesheets for the period the Claimant worked, except that for late December 2016 and January 2017. There is one page for each month, with each page ending on the last Friday of each month. Within that, the timesheets are broken down on a weekly basis, showing start and finish times, whether a break was taken and whether the day was annual leave or sickness absence. A total number of hours is given for each day and there is also a weekly total of hours worked.
13. The Claimant explained that she completed the timesheet and weekly totals of hours. She then signed the timesheet under the note "*I confirm that the information provided here is correct to the best of my knowledge*".
14. Mr Rehman worked for the accountancy firm that ran the payroll for the Respondent. His role was purely administrative. He was told by the nursery what was due to a particular employee each month and simply paid that money over, subject to his calculations on deduction of PAYE tax and national insurance contributions. He had no first-hand knowledge of what work had been done by any particular individual, nor did he have anything other than a basic administrative role in calculating how much someone was due in any particular month.
15. He told me that following the Claimant's claim "*I was contacted by the Respondent ... and revisited the salary computations for the Claimant*". At that point the Respondent provided Mr Rehman for the first time with the timesheets. He was instructed to calculate, based on the timesheets, what was properly due to the Claimant.
16. The outcome of this is a spreadsheet at page 48 of the tribunal bundle in which he sets out against each month firstly the information he was originally given by the Respondent about pay, his pay calculations based on that and the resulting gross amount that was paid to the Claimant, and then his revised pay calculations having seen the timesheets and applied the hourly rate of the national minimum wage to that. This shows the Claimant to have been underpaid by typically around £100-200 a month, with Mr Rehman calculating that a further £1,630.42 gross was due to the Claimant. This was paid on 2 October 2017 and resulted in a net payment of £1,190.37 to the Claimant. It appears that the first she knew of this payment was when it arrived in her bank account, and she was not told how it had been calculated. A payslip dated August 2017 was issued in respect of this payment. It appears that Mr Rehman also then amended some of the previous payslips to reflect this additional payment, although on what basis that was done was not clear. Mr Rehman said that he intended to issue a revised P45 to the Claimant to reflect this additional payment but was awaiting the outcome of this hearing before doing so, in case any more payments were found to be due to the Claimant.
17. Mr Rehman did not give any explanation of the principles he had followed in carrying out his calculations. His arithmetic and the number of hours he has counted for each month are evident from his spreadsheet, but the timesheets themselves are open to interpretation in a number of different ways, as is the question of which hours recorded are to be counted for the purposes of any national minimum wage calculation.
18. While the timesheets were originally completed by the Claimant it is apparent that the Claimant's entries have been subject to amendment after she signed the timesheet. Someone, presumably a manager within the Respondent's organisation, has changed them including showing some days as holiday or sickness when claimed as a working day by the Claimant, as well as changes to the claimed working hours, with apparent reductions on the basis that the Claimant had been late for work.

19. The parties were unable to agree any aspect of Mr Rehman's calculations, or even set out for me what the areas of dispute were. It appeared that there were at least differences between them over the relevant reference period that should apply. One indication of the general difficulty with the timesheets is that on Miss Rowley's attempt, with the assistance of Ms Warner, to explain the first (January 2016) timesheet to me, she could not get the hours recorded there to come to the total noted on the sheet (138 hours), or the different figure (apparently 100 hours) adopted by Mr Rehman in his calculations.
20. Accordingly, I have had to carry out from first principles my own calculations and analysis of the timesheets.
21. In doing so I have taken the weekly hours claimed as the number of hours that count for the purposes of the national minimum wage except that in accordance with regulation 23(1)(a) of the National Minimum Wage Regulations 2015 days recorded as sickness absence have been ignored. Under the same regulation periods of holiday have been included.
22. Given that the burden of proof and obligation to keep proper records are both on the Respondent, in cases of ambiguity or doubt I have included hours as being working hours. I have not made the "15 minutes late" deductions as the Respondent bears the burden of proof and has not explained to me the basis on which those deductions were made.
23. The timesheet for late December 2016 and January 2017 is missing. I have taken the rota for this period to be my best guide to the Claimant's working hours for this month.
24. Appendix A to these reasons is extracted from Mr Rehman's spreadsheet, and gives his calculations as to the hours worked for each pay period, including the amount that should have been paid and which was eventually paid, taking into account the additional October payment. Appendix B gives my calculations of the relevant hours, hourly rate and amounts that should have been paid. Appendix C gives my calculation of the relevant hours for each week.
25. Although not referred to in Mr Rehman's calculations, in her evidence Ms Warner said "*the Claimant received a one off payment of £280 as a goodwill gesture as she had informed the Director, Ms Iqbal that she was having financial difficulties. The cheque was given to the Claimant to make up any difference in pay. I also believe that the Claimant had been signed off sick around that time and may not have qualified for statutory sick pay.*"
26. Whatever the nature of this payment, it would appear not to count for minimum wage purposes under regulation 10(h)(i) of the National Minimum Wage Regulations 2015 as it was payment for a period of absence.
27. Mr Rehman's calculation of the wages paid also included payments of £53.07 and £36.38 for SSP in November 2016 and January 2017 which would not count for the same reason.
28. The amount that is therefore due to the Claimant on the basis of an unlawful deduction from wages in respect of these "standard" hours is the amount that I find to be due, less the amount set out by Mr Rehman as paid but excluding those payments of SSP. That is: £15,228.40 – (£14,511.05 - £53.07 - £36.38) = **£806.80**.

Early starts

29. The Claimant said in her evidence that "*I was asked to attend work each day at least 15 minutes before my start time*".

30. This is undoubtedly correct. The Respondent's document headed "Staff Conduct Do's and Don'ts" at page 127 of the bundle has under "Do's" "*Arrive 15 minutes early for shift and when coming back into the building from breaks.*" This document is signed by the Claimant against a note saying "*I ... will ensure that this is followed at all times. I am aware that failure to adhere to this will result in disciplinary action.*"
31. In her evidence, Ms Warner said that this was not the kind of rule that someone could get disciplined for disobeying. I asked her what the purpose of the rule was. She said that it was to allow enough time for the staff to sign in, remove their coats and if necessary sign in their mobile phones before starting work with the children. She explained that due to regulations it was always necessary to have a certain number of staff on duty depending on the number of children in the nursery. The shifts were scheduled to start at the same time as the children started, so staff had to be actually in their room and ready to look after the children at their allocated shift start time. She said that provided this happened and staff had completed their signing in formalities she was not particularly concerned with exactly how early they arrived for work, and if they did arrive 15 minutes early and had signed in their time was their own before they actually started work, so they could talk to their colleagues, use their mobile phones or make a cup of tea.
32. By contrast, when asked about this the Claimant said that it was a firm rule, and that she would get into trouble if she was not there 15 minutes ahead of her shift. She said that staff were not free to use that time before their shift, that she would do work in this time if work was available, and she would spend that time helping out with other rooms or catching up on her paperwork.
33. It is evidently the case that staff were expected to arrive 15 minutes early at both the start of the day and on resuming work after their lunch break. It also appears that this is in fact what the Claimant did. I do not have complete records, but a comparison of the rota at page 93 with the signing in sheet at page 148 shows during the week of 9 January 2017 she always signed in 15 minutes before her allocated shift time and, although the lunchtime records are generally less clear, she appears mostly to have signed out for 45 minutes rather than the hour to which she was entitled as a lunch break.
34. All the argument before me appeared to be structured on the basis that the Claimant was carrying out "time work" under the National Minimum Wage Regulations 2015. Under regulation 32(1), "*time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.*"
35. On my findings the Claimant clearly was and was required to be available 15 minutes before her scheduled shift start time and before the start of her afternoon work. The only question is whether this was "*for the purposes of working*".
36. This is not a point I have found easy to resolve. I am conscious that is it for the Respondent to demonstrate proper payment of the national minimum wage, but also it seems to me that the employer in this case had little to gain by the attendance of staff 15 minutes before the start time except for, as Ms Warner said, ensuring that they were able to start their shift promptly so that the proper ratios were complied with at the time when the children would be at the nursery.
37. The Respondent would do well to reconsider this rule, but on balance I accept what Ms Warner told me, that this time was available for the staff to do what they wanted in, including such things as making tea or playing with their phone. The important thing was that they were ready to start their work with the children on the scheduled start time. Accordingly, these 15-minute periods did not count as time in respect of which the minimum wage was due.

Late finishes, staff meetings and home working

38. It was the Claimant's case that in many instances she would not only start early but would also finish late – sometimes because there was work to be done in tidying up or cleaning after the children had left, other times because of staff meetings and sometimes because of paperwork that she did not have time to deal with during the day and would have to take home. The additional work was estimated by her as being 6-7 hours a week. She said that the staff meetings lasted at least an hour and a half each time.
39. Ms Warner produced notes of staff meetings (which she said had to be kept for regulatory purposes) showing a total of 4½ hours of staff meetings across seven meetings (one of which the Claimant did not attend) from September 2016 (when she became the manager) to February 2017. She said that notes of meetings prior to September 2016 would have been archived. She said that it was not in her interests to have long meetings, and she wanted to keep them as short as possible. Despite itemising in her witness statement meetings totalling 4½ hours her witness statement also says that the Claimant attended meetings for a total of 7 hours and 20 minutes. It is not clear where Ms Warner got these timings from. They do not appear to be recorded in the meeting notes contained in the tribunal bundle.
40. The Claimant's contract of employment says that she will be compensated for any meetings outside normal working hours "*by means of an annual outing organised by the nursery*". However, this clause in the contract is specifically itself subject to considerations in relation to the national minimum wage, and Miss Rowley did not suggest that the outing could have any relevance where the minimum wage was not paid, nor did she suggest that these meeting were not working time. The dispute between the parties was as to the length of the meetings.
41. Mrs Latif in her arguments said that the contract provided for meetings being two hours long, but I accept what Ms Warner said about it not being in her interests for the meetings to be long. The tone of the notes is terse, recording a series of instructions and exhortations being given to staff. This suggests to me that the meetings were certainly shorter than two hours. While Ms Warner's statement does not say where she has got her timings from, they appear to me to be likely as the accurate timings for the meetings. There would have been meetings prior to September 2016, but if they were of a similar pattern to the later ones (as seems likely) then the overall total time given by Ms Warner – 7 hours 20 minutes, seems credible. This was, however, all working time. Almost all of this would have been at the hourly rate of £7.20, so I calculate the amount due in respect of these meetings as being $7.33 \times £7.20 = \mathbf{£52.78}$.
42. The question of the late finishes and home working is more difficult to assess. The Claimant painted a broad picture of these, with no particular specifics about when the late finishes and home working had occurred. It was the Respondent's case that an hour of non-contact time was permitted during the day which was sufficient to allow for cleaning and administrative tasks, and that in any event child protection considerations meant that staff were not allowed to take children's records home. As previously, the onus is on the Respondent to show that the national minimum wage has been paid, but I cannot say with any confidence what, if any, after-hours work was done by the Claimant, and therefore do not make any award in respect of this.

Uniform

43. Under the terms of her contract, the Claimant was obliged to wear a uniform specified by the Respondent. One of the items of uniform was a polo shirt with the Respondent's logo on it. Under her contract of employment (and it was agreed that this was what occurred in practice) one polo shirt was provided free of charge. Additional polo shirts could be purchased from the Respondent. The Claimant said that the cost of these were £5 each, but Ms Warner corrected that to £15 each in her evidence. The Claimant said that she bought four additional polo shirts. This did not seem to be accepted by the Respondent, but they called no evidence to contradict

what the Claimant said, and I accept that she bought four polo shirts at £15 each. This was done by paying the Respondent cash for the polo shirts.

44. There was some argument before me about whether it was reasonable to expect a person to get by with one polo shirt, and what the consequences of that were for hygiene in the nursery.
45. In the course of submissions, I invited Miss Rowley to comment on regulation 13(a) of the National Minimum Wage Regulations 2015, which provides that "*the following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period ... payments paid by ... the worker to the employer, as respects the worker's expenditure in connection with the employment*". Miss Rowley commented that there was no requirement for the Claimant to buy additional uniform, and that in any event it was not necessary for her to buy these additional polo shirts. She also argued that it appeared that these purchases, if they had occurred, had occurred more than three months prior to the lodging of the employment tribunal claim, and so anything in relation to them was out of time.
46. Despite Miss Rowley's submissions, regulation 13(a) contains no proviso that the expenditure be necessary or even reasonable. All that is required was that the expenditure was in connection with the employment, and the expenditure on polo shirts as uniform was. It must therefore be treated as a reduction in the Claimant's pay for minimum wage purposes.
47. As for the question of this being out of time, it is true that the Claimant did not suggest that these purchases had been made towards the end of her employment. Most likely they seemed to have been made around the middle of 2016. Nevertheless, I consider that I have jurisdiction to consider this complain as one of unlawful deductions from wages because the Claimant's argument (which I accept) is that the overall failure to pay the minimum wage amounts to a series of deductions. Accordingly, this can be considered by me. The fact that this reduces the amount of pay which counts for minimum wage purposes means that there is a further $4 \times £15 = \text{£60}$ due to the Claimant.

Bank charges

48. The Claimant sets out at pages 13 and 14 of the bundle a claim in relation to bank charges incurred as a result of late payment of her final wages. Such losses can in principle be awarded under section 24(2) of the Employment Rights Act 1996.
49. Miss Rowley's criticism of the Claimant's claim in respect of these was that she had not produced the original bank statements showing the bank charges. It was not explained to me whether these had been sought earlier from the Claimant or, if sought, what the response from the Claimant was. It was not part of Miss Rowley's submissions that the final wages had actually been paid on time. I accept what the Claimant tells me about these charges, and the amount of the bank charges can properly be awarded to the Claimant as a consequence of the final unlawful deduction from wages. This comes to £20 x 3 of overdraft fees and £30 x 4 for bank charges, totalling **£180**.

Additional days' work, training

50. The Claimant said that she had worked an additional day – 2 January, working on a particular room at the nursery. She gave specific details of this, and I accept what she said. However, this was recorded and accounted for as a day of work in my calculations on her standard hours set out above, so there is nothing more to be awarded in respect of this.
51. The Claimant also referred to two training courses she had had to attend out of hours – a full day on first aid and an evening session on autism. Although it is said in her

statement that there were four courses, these are the only ones specifically referred to. The minimum wage ought to be paid for such training, which I assess as 8 hours for the full day course and two hours for the evening course, thus totalling 10 x £7.20 = **£72**.

Holiday pay

52. The Claimant said that she had not been paid the full holiday pay she was due on termination of employment. Ms Warner pointed out that the holiday year specified in the Claimant's contract was January to December, so any holiday pay claim could only relate to holiday accrued in the period from January 2017 onward. The bundle contains holiday records, which show that the Claimant has taken (and been paid for) all holiday she accrued in that period, even when 2 January 2017 is not counted as holiday. There is no further holiday pay due.

Other matters

53. As mentioned above, the Claimant referred in her statements to a number of other claims which were either not pursued at the tribunal or did not appear to be within my jurisdiction. She said that she had not been offered a pension, but Ms Warner said (and I accept) that the relevant staging date had not been reached until August 2017.

Conclusions

54. The Respondent has failed in a number of respects to pay the national minimum wage to the Claimant, and these failures take effect legally as unlawful deductions from wages, which must now be paid to the Claimant. The total is as follows:

'Standard' hours	£806.80
Staff meetings	£52.78
Uniform	£60.00
Training courses	£72.00

The additional £180 in respect of bank charges must be added to that under section 24(2), giving:

Total:	£1,171.58
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signed on 3 November 2017
Employment Judge Anstis

Judgment sent to Parties on

7 November 2017

APPENDIX A

Mr Rehman's calculations

Pay month:	Hours:	Amount:
Jan-16	100	£670.00
Feb-16	136	£911.20
Mar-16	160	£1,072.00
Apr-16	144	£1,036.80
May-16	144	£1,036.80
Jun-16	160	£1,152.00
Jul-16	152	£1,094.40
Aug-16	152	£1,094.40
Sep-16	144	£1,036.80
Oct-16	154	£1,108.80
Nov-16	104	£801.87
Dec-16	160	£1,141.20
Jan-17	160	£1,173.98
Feb-17	164	£1,180.80
Total:	2034	£14,511.05

APPENDIX B

My calculation of "standard" hours:

Pay month:	Hours:	Sub-total:	Hourly rate:	Due:
Jan-16	132			
Feb-16	144			
Mar-16	184	460	£6.70	£3,082.00
Apr-16	132			
May-16	165			
Jun-16	152			
Jul-16	156			
Aug-16	179			
Sep-16	150			
Oct-16	161			
Nov-16	95			
Dec-16	152			
Jan-17	185			
Feb-17	160	1687	£7.20	£12,146.40
	2147			£15,228.40

SCHEDULE 3

My calculation of weekly hours

W/c	Hours
04-Jan-16	40
11-Jan-16	40
18-Jan-16	20
25-Jan-16	32
01-Feb-16	40
08-Feb-16	40
15-Feb-16	24
22-Feb-16	32
29-Feb-16	40
07-Mar-16	40
14-Mar-16	40
21-Mar-16	40
28-Mar-16	32
04-Apr-16	29
11-Apr-16	32
18-Apr-16	39
25-Apr-16	32
02-May-16	40
09-May-16	37
16-May-16	40
23-May-16	40
30-May-16	40
06-Jun-16	40
13-Jun-16	40
20-Jun-16	40
27-Jun-16	40
04-Jul-16	28
11-Jul-16	40
18-Jul-16	40
25-Jul-16	32
01-Aug-16	40
08-Aug-16	40
15-Aug-16	40
22-Aug-16	43
29-Aug-16	40
05-Sep-16	40
12-Sep-16	24

19-Sep-16	38
26-Sep-16	32
03-Oct-16	41
10-Oct-16	40
17-Oct-16	32
24-Oct-16	40
31-Oct-16	40
07-Nov-16	24
14-Nov-16	7
21-Nov-16	0
28-Nov-16	40
05-Dec-16	32
12-Dec-16	40
19-Dec-16	40
26-Dec-16	24
02-Jan-17	40
09-Jan-17	40
16-Jan-17	41
23-Jan-17	40
30-Jan-17	40
06-Feb-17	40
13-Feb-17	40
20-Feb-17	40
Total:	2147